

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

)	
In the Matter of)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Petition of GroupMe, Inc./)	
Skype Communications S.A.R.L.)	CG Docket No. CG 02-278
For Expedited Declaratory Ruling)	
)	

GROUPME, INC.'S COMMENTS

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Dated: August 30, 2012

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Executive Summary

GroupMe seeks clarification from the Commission with respect to two particular issues. First, GroupMe seeks clarification that the term “capacity” (as used in the Telephone Consumer Protection Act (“TCPA”)) to define equipment constituting an automatic telephone dialing system (ATDS), encompasses *only* equipment that, at the time of use and without first being technologically altered, is capable of autodialing random or sequential numbers. Neither the policy goals of Congress in enacting the TCPA, nor those of the Commission in implementing a regulatory scheme, support a more expansive interpretation of “capacity” that would include equipment not used to autodial or that would require alteration before being used in order to satisfy the definition of an ATDS.

GroupMe further requests clarification that wireless subscribers may, through an intermediary, provide GroupMe with “prior express consent” to receive non-telemarketing, informational text messages. Obtaining consent through an intermediary is essential to GroupMe’s service, as well as numerous other informational services that rely on text messaging. As group text messaging becomes more popular, it is essential that the Commission clarify the scope of intermediary consent. Clarifying the scope of what constitutes an ATDS and the permissibility of intermediary consent would provide much needed guidance for courts interpreting the TCPA, and would stem the tide of frivolous lawsuits that plague the industry and do nothing to further the policy goals of either Congress or the Commission.

Finally, as detailed herein, GroupMe’s service implicates important First Amendment considerations. The text messages sent by GroupMe are non-commercial in nature, and the only authorized use of the service is for non-commercial purposes. Yet, the ATDS provision of the

TCPA has been wrongly interpreted by some jurisdictions to include all programmable equipment used to send text messages, does not distinguish between commercial and non-commercial text messages, and requires some form of prior express consent from the recipient. The Petitioner submits that should the Commission fail to clarify the definition of an ATDS and should it not allow service providers to obtain consent through an intermediary to send non-commercial text messages, the TCPA's ATDS provision is unconstitutional as applied to GroupMe.

When drafting the TCPA, Congress made no distinction between commercial and non-commercial use due to the fact that in 1991 (when the TCPA was passed) ATDS was an expensive technology employed solely for commercial purposes. Had Congress known that non-commercial uses would eventually become captured by the TCPA's restrictions, Congress would most likely have provided for safeguards to ensure that the statute would survive First Amendment scrutiny. To date, the ATDS provision has survived First Amendment challenges, but only in cases involving commercial speech. To survive First Amendment review in a non-commercial speech setting, the Commission must clarify the provisions of the TCPA as discussed above. Failure to do so will render the TCPA unconstitutional as applied against GroupMe and similar services.

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GROUPME, INC.’S COMMENTS

GroupMe, Inc. (“GroupMe”), by its undersigned counsel, respectfully submits these comments supporting its Petition for Expedited Declaratory Ruling and Clarification¹ pursuant to the Public Notice issued July 24, 2012, by the Federal Communication Commission (“Commission” of “FCC”) in the above-referenced proceeding.² GroupMe seeks clarification from the Commission with respect to two important issues. First, as detailed in the Petition, litigation has proliferated due to ambiguity surrounding the meaning of an “automatic telephone dialing system” (“ATDS”), as defined in § 227(a)(1) of the Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(1) (the “Act” or “TCPA”). GroupMe seeks clarification that the term “capacity,” as used to in the TCPA to define equipment constituting an ATDS, encompasses only equipment that, at the time of use and without first being technologically altered, is capable of

¹ See *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (“GroupMe Petition”), at 2 n.4, 3 n.5, 12 n.23, and 15 n.32.

² *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc.*, DA 12-1180 (rel. Jul. 24, 2012) (“Public Notice”).

autodialing random or sequential numbers. Neither the policy goals of Congress in enacting the TCPA nor those of the Commission in implementing a regulatory scheme for the Act support a more expansive interpretation of “capacity” that would engulf equipment not used to autodial or that would require alteration before being used in order to satisfy the definition of an ATDS.

Second, GroupMe seeks clarification that wireless subscribers may, through an intermediary, provide GroupMe with “prior express consent” to receive non-telemarketing, informational text messages. GroupMe provides a service that relies on individuals to create groups of a limited size to participate in non-commercial group conversations through text messaging, and further relies on group creators to obtain the group members’ consent to receive those text messages. Accordingly, obtaining consent through an intermediary is essential to GroupMe’s service.

I. THE COMMISSION MUST CLARIFY THE DEFINITION OF “AUTOMATIC TELEPHONE DIALING SYSTEM” (ATDS)

The TCPA’s definition of an ATDS must be clarified. Despite the clear intention of the TCPA, which was to curb abuses associated with telemarketing and exacerbated by the use of automated dialing equipment, much of the nuisance litigation that has ensued is due to how some courts have interpreted the term “capacity.” Extending the TCPA’s ATDS provision to include text messaging, coupled with an expansive definition of what constitutes ATDS equipment, is read by some to result in any programmable equipment satisfying the definition.³ The absurdity of the current state of the law in some jurisdictions is that even if software and/or equipment as deployed does not allow for the functionality to randomly or sequentially dial telephone num-

³ See GroupMe Petition, at 9-16 (explaining that even the ubiquitous consumer smartphone can be found to meet the definition of an ATDS under some courts interpretation of the definition).

bers, service providers can still face lawsuits on the basis that the equipment *could be altered* to meet the definition of an ATDS.⁴ Not only do these putative class action lawsuits waste resources of courts, companies, and now the Commission, but they also inhibit innovation and prevent the development of exciting, new communications tools. Some TCPA litigation has become so egregious that confirmatory opt-out text messages, sent solely in response to consumers' requests to stop receiving text messages they initially requested, form the basis of class action complaints.⁵

Clarifying the scope of what constitutes an ATDS would provide much needed guidance to courts interpreting the TCPA, and would stem the tide of frivolous lawsuits that plague the industry and do nothing to further the policy goals of either Congress or the Commission. As set out in its Petition, GroupMe requests the Commission find the term “capacity” encompasses only equipment that, at the time of use and without first being technologically altered, could, in fact, have autodialed random or sequential numbers without human intervention.⁶ GroupMe’s proposed definition of “capacity” would continue to prohibit the types of activities intended under the TCPA and the Commission’s rules by prohibiting the use of equipment with the actual capability to randomly or sequentially dial telephone numbers. The proposed definition would neither disturb the Commission’s *2003 TCPA Report and Order* nor would it undermine the *2008 Declaratory Ruling*⁷ concerning predictive dialers.⁸

⁴ *Id.*

⁵ *See, e.g., SoundBite Communications Inc. Petition for Expedited Declaratory Ruling*, (filed Feb. 16, 2012).

⁶ *See* GroupMe Petition, at 14-16.

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559 (2008) (“*2008 Declaratory Ruling*”).

⁸ *See* GroupMe Petition, at 15-16.

II. THE COMMISSION MUST CLARIFY THAT SERVICE PROVIDERS CAN RELY ON CONSENT OBTAINED THROUGH INTERMEDIARIES WHEN SENDING NON-COMMERCIAL TEXT MESSAGES

Even a casual review of the docket reveals the necessity of clarifying the type of “prior express consent” service providers must obtain in order to send administrative, informational, non-commercial text messages. Most recently, the Cargo Airlines Association (“CAA”) filed a Petition for Expedited Declaratory Ruling seeking clarification that package delivery companies can rely on intermediaries to obtain and provide the delivery companies with consent from package recipients to receive non-commercial text messages, notifying the recipients when their packages are delivered.⁹ As explained in the CAA Petition, package delivery companies often times do not have “any direct contact with the package recipients until the package has been shipped (and usually only at the time of delivery) [and] it would be impossible for [the delivery companies] to provide millions of package notifications each day if they first had to obtain consent independently from each package recipient.”¹⁰ The delivery companies, therefore, rely on the package senders to obtain prior express consent from the recipients and provide that consent to the delivery companies.

The utility of relying on consent through an intermediary for package deliveries is just one example of enabling non-commercial text messages wireless subscribers want to receive. Many schools depend on intermediaries to obtain consent from wireless subscribers, such as parents and caregivers, who want to receive text messages concerning unscheduled closings, early dismissals, and other important information. Typically, one adult completes the relevant school forms or otherwise provides contact information to the school on behalf of themselves

⁹ See *Cargo Airline Association, Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Aug. 17, 2012) (“CAA Petition”).

¹⁰ See *id.* at 4-6.

and multiple people who want to, and have consented to, receive text messages from the schools.¹¹ Again, the beneficial nature of receiving school-related text messages and allowing schools to rely on intermediaries to obtain and pass on the consent is self-evident.

The same is true for GroupMe which, notably, prohibits group creators and group members from using the service for commercial purposes.¹² The idea behind GroupMe is that the creator of the group has a personal, familial, or professional relationship with the proposed group members and that the non-commercial subject matter of the group is of interest to those individuals.¹³ Similar to package delivery or school closing text messages, the group creator believes that the text messages to be circulated among the group's participants are communications each recipient wants to receive and, accordingly, has obtained prior express consent from each group member to receive those text messages. Once that consent is obtained by the group creator and provided to GroupMe along with the group creator's initial message, GroupMe sends text messages alerting the identified group members that they have been added to the group. GroupMe's text messages also identify the group creator and subject matter of the group, and inform each recipient how they can opt-out from the group or from receiving any messages from

¹¹ The record is replete with many other examples. As recognized in its most recent order, the FCC did not want to impede non-commercial text messages like fraud alerts, bank account balances, and other informational text messages. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (2012), at ¶ 12.

¹² *See* <https://groupme.com/terms> (visited Aug. 30, 2012). Under the section "User Responsibilities," users must, among other things, "ensure that the Content is not spam, is not machine- or randomly-generated, and does not contain commercial content." *Id.*

¹³ *See* Ex Parte Letter from Ronald W. Del Sesto, Jr, counsel for GroupMe, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2-3 (filed July 18, 2012) ("*July 18 Ex Parte*") (discussing the inspiration for the creation of GroupMe, and the non-commercial nature of the service).

GroupMe ever again in the future.¹⁴ Importantly, GroupMe’s administrative text messages to the group are triggered solely by the group creator’s actions and could not otherwise be sent.

Group text messaging is becoming more popular as usage by a broad cross-section of wireless consumers continues to grow in the United States. Many pre-installed text messaging applications allow for sending group text messages. The recipient can easily respond to all members of the group by replying as they would to any text message similar to the “reply all” function common in email applications.

GroupMe enhances the user experience for group texting services in many ways. Group creators can maintain multiple groups organizing text communications according to relationships, subject matter, and other categories. GroupMe allows those that do not have wireless phones or prefer not to receive text messages to participate in GroupMe groups through a free application that users can download as a desktop and/or mobile client. Finally, by providing recipients of a GroupMe creator’s group with the ability to opt-out, GroupMe provides a valuable service to recipients of group text messages.

Unlike many other texting applications preinstalled on wireless devices, GroupMe allows text recipients to manage the group text messages they receive. Recipients on GroupMe’s service can opt-out of receiving text messages immediately after the group is established or at any point in the future. Also, immediately after receiving a GroupMe administrative text message, triggered solely by the creation of a group, a recipient can opt-out from ever receiving a text message from GroupMe again. GroupMe allows for blocking a particular group creator from adding a user to a GroupMe group if the user has expressed such a desire. Additionally, the GroupMe

¹⁴ A detailed description of the GroupMe service is provided in its Petition. *See* GroupMe Petition, at 4-8.

community can report “bad actors” and GroupMe can terminate abusive users. Finally, the company monitors the system for usage that violates its Terms of Service.

In contrast to GroupMe’s service, other text messaging applications preinstalled on wireless devices do not provide group text message recipients a means to opt-out, and there is no way for the group creator to modify the recipient list after the first group text message has been sent. There is no community policing bad actors. Not so for GroupMe. GroupMe provides an organized virtual space for its members to converse and allows users to choose whether or not they want to participate. Accordingly, GroupMe respectfully requests that the Commission make clear that for non-telemarketing, informational text messages which can be permissibly be made using an ATDS under the TCPA with the called party’s oral prior express consent, the sender of the text message can rely on a representation from an intermediary that they have obtained the necessary consent from the text message recipient.¹⁵

III. THE COMMISSION MUST TAILOR ITS RULES TO PREVENT THE TCPA ATDS PROVISION FROM VIOLATING THE FIRST AMENDMENT

GroupMe’s service implicates important First Amendment considerations due to a unique set of facts. As previously discussed, the administrative text messages sent by GroupMe are non-commercial in nature, and the only authorized use of the service is for non-commercial purposes.¹⁶ Yet, the ATDS provision of the TCPA has been interpreted by some courts to include all programmable equipment used to send text messages, does not distinguish between commercial and non-commercial text messages, and requires some form of prior express consent

¹⁵ See also, GroupMe Petition, at 16-19.

¹⁶ As detailed in meetings with the FCC and an ex parte filing, GroupMe recently announced “Experiences by GroupMe.” See *July 18 Ex Parte*, at 1. Importantly, the Petition before Commission concerns the non-commercial group texting service and not “Experiences by GroupMe.”

from the recipient. The Petitioner submits that should the Commission fail to clarify the definition of an ATDS and should it not allow service providers to obtain consent through an intermediary to send non-commercial text messages, the TCPA's ATDS provision is unconstitutional as applied to GroupMe.

As explained in its Petition and other filings,¹⁷ the GroupMe text messaging service is non-commercial, allowing individuals to engage in group conversations. To be sure, the distinction between commercial and non-commercial speech can be difficult to draw. But in this instance, the text messages sent by GroupMe and the overall group texting service presents an unusually straight-forward analysis. One need only look to *Central Hudson*,¹⁸ where the Supreme Court established the relevant framework for determining the constitutionality of a regulation of commercial speech, for guidance.¹⁹ Under *Central Hudson*, commercial speech is either “expression related solely to the economic interests of the speaker and its audience[,]”²⁰ or “speech proposing a commercial transaction... .”²¹ The text messages sent by GroupMe do not reference any type of commercial offering, nor do they propose a commercial transaction. Instead, GroupMe's text messages are only triggered by a user establishing a group, are only sent to the user-defined group, and consist of instructions on how to use the service and how to opt-out. In short, they are completely devoid of commercial content.

¹⁷ See GroupMe Petition; *July 18 Ex Parte*.

¹⁸ As addressed with additional detail *infra*, we are not conceding that *Central Hudson* is the applicable precedent when examining whether the TCPA ATDS provision survives First Amendment scrutiny; rather, we cite to the decision in support of GroupMe's position that its speech is non-commercial.

¹⁹ See *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of New York*, 447 U.S. 557 (1980).

²⁰ *Id.* at 561.

²¹ *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978)).

Text messages sent by GroupMe are initiated once a group creator establishes a group. Text messages sent by GroupMe are administrative and informational, meant to alert the recipient to the fact that they have been added to a group, to educate the recipient how to use the service, or to notify the recipient that they have been removed from a group by failing to act. GroupMe’s technical measures and its Terms of Service all serve to bolster non-commercial use of the service. Specifically, the maximum group size is limited to twenty-five participants (though the average is five), there is no way to chain groups together to exceed the limit, GroupMe enables the use of only long codes rather than short codes to transmit text messages, the company monitors for unusual usage that would suggest bulk text messaging, and its Terms of Service prohibit commercial use of the service.²² GroupMe does not charge for the service or its application and never sends marketing text messages to its members. In fact, the service as configured would not even allow GroupMe to send any bulk text messages to all users. Accordingly, GroupMe sends exclusively non-commercial text messages, and the company’s adopted and enforced Terms of Service limits its offering to non-commercial use.

Despite the fact that GroupMe and its members use the service for non-commercial purposes, the ATDS provision makes no distinction for non-commercial use unlike the unsolicited commercial facsimile section of the statute.²³ The legislative history illustrates that Congress

²² The “User Responsibilities” section of the GroupMe Terms of Service provide the applicable provisions limiting the use of the service to non-commercial services. See <https://groupme.com/terms>. GroupMe has never had to terminate a user for commercial use of the service. See *July 18 Ex Parte*, at 5 (concerning the Terms of Service employed by GroupMe to ensure non-commercial use). See also Common Short Code Administration, at <http://www.usshortcodes.com> (visited Aug. 30, 2012) (providing an overview of short codes and their uses).

²³ Compare 47 U.S.C. § 227(b)(1)(A) (prohibiting “any call” with few exceptions), with § 227(b)(1)(C) (limiting the restriction to the sending of a communication that includes an “unsolicited advertisement”).

crafted the provision related to unsolicited commercial facsimiles explicitly taking into account First Amendment considerations.²⁴ Moreover, the Congressional record demonstrates that there was no factual support for prohibiting non-commercial facsimiles as such messages represent communications that the recipient likely desires.²⁵ While the overall context of the Congressional record addressing the unsolicited non-commercial facsimile provision concerned facsimiles originated by tax exempt organizations, the reason for differentiating between commercial and non-commercial speech in the statute was based upon consumer expectations. Congress most likely rightly assumed it could not prohibit facsimiles sent by individuals and thus did not debate it, yet this is precisely what occurs when the ATDS provision of the TCPA is applied to a service like GroupMe's.

The ATDS provision makes no distinction between commercial and non-commercial use. Clearly, Congress made no such distinction due to the fact that in 1991, when the TCPA was passed, ATDS was an expensive and unusual technology employed solely for commercial purposes. In addressing the harms associated with the use of ATDS, distinguishing between commercial and non-commercial use simply made no sense as all uses of the technology were commercial. Congress certainly did not foresee that this provision would apply to personal text messaging designed for friends and family decades later. Had Congress considered such an

²⁴ See, e.g., H.R. Rep. No. 102-317, at 16 (1991) (emphasizing that consumer expectations are different when communications concern non-commercial matters).

²⁵ *Id.* (“In addition to the relative low volume of non-commercial calls, the Committee also reached the conclusion, based on the evidence, that such calls are less intrusive to consumers because they are more expected.”). The distinction between commercial and non-commercial speech as applied to facsimiles was an important factor when the provision withstood judicial scrutiny. See, e.g., *State of Missouri v. American Blast Fax*, 323 F.3d 649, 655-56 (8th Cir. 2003) (subsequent history omitted) (upholding the unsolicited commercial facsimiles provisions of the TCPA under the *Central Hudson Test* in part based on Congressional findings with respect to the recipient's expectations).

outcome, it most likely would have considered non-commercial use and drafted safeguards such that the statute would survive First Amendment scrutiny. One need only consider the unsolicited commercial facsimile provisions to know that this would have been the probable result of any legislation aimed at restricting the use text messaging to protect consumers.

The constitutionality of the ATDS provision as applied to text messages has only been considered by a few courts.²⁶ While it has been upheld, the commercial nature of the text messages at issue were central to each court's analysis. In *Lozano*, the court applied the analytical framework established by the Supreme Court in *Central Hudson*, which is the appropriate standard when reviewing the regulation of commercial speech. Under *Central Hudson*, a regulation of commercial speech is found compatible with the First Amendment if: (1) there is a substantial government interest; (2) the regulation directly advances the substantial government interest; and (3) the proposed regulations are not more restrictive than necessary to serve that interest.²⁷

Assuming *arguendo* that *Central Hudson* is the appropriate test for GroupMe's offering (which it is not), the ATDS provision fails to satisfy the first two prongs. The *Lozano* court identified the substantial government interest as the protecting consumers' privacy from unsolicited *commercial* text messages.²⁸ There is no substantial government interest in regulating non-commercial speech of an individual and then the group discourse that ensues. In fact, to take a contrary view would be tantamount to subjecting an individual using a smartphone to TCPA

²⁶ See, e.g., *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d. 999 (N.D. Ill. 2010); *Joffe v. Acacia Mortgage Corp.*, 121 P.3d. 831 (Ariz. Ct. App. 2005).

²⁷ See *Central Hudson*, 447 U.S. at 566. Note that *Central Hudson* refers to a four-part analysis but the first step of the four-part analysis, whether the commercial speech at issue concerns lawful activity and is not misleading, is easily satisfied. See *id.*

²⁸ See *Lozano*, 702 F. Supp. 2d.at 1010-1011.

liability should they text the wrong number or even place a voice call to an *intended* number.²⁹ The Congressional record established at the time the TCPA was passed makes clear that substantial government interest it addresses is protecting consumers from unsolicited commercial speech, a fact recognized by the Commission,³⁰ and relied on in *Lozano*. Moreover, the TCPA's legislative history illustrates that citizens do not consider non-commercial speech intrusive but expected.³¹ In the absence of articulating a substantial government interest, there can be no regulation that advances that interest so the second prong of *Central Hudson* is not met.

Even if one assumes that the substantial government interest the ATDS provision is meant to promote is unsolicited commercial text messages, the ATDS provision as applied to GroupMe still fails. The term “capacity” has been interpreted by some courts to include equipment and software that could potentially be altered to allow for sequential and random dialing even if the equipment was not capable of those functionalities when deployed. In so doing, the TCPA can be interpreted as prohibiting any form of group text messaging as a means of communication regardless of whether such communication is commercial or non-commercial. Forbidding the use of an entire communication platform, particularly one as pervasive as text messaging, does not satisfy the requirement under *Central Hudson* that the regulation is not more restrictive than necessary to serve the substantial government interest of prohibiting unsolicited commercial text messages.

²⁹ See, e.g., GroupMe Petition, at 10-11 (explaining the absurd results that can occur if the term “capacity” is not clarified as proposed by GroupMe).

³⁰ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003), at 14052-54. “In effect, Congress has erected a wall - or more accurately permits a citizen to erect a wall - that no *advertiser* may penetrate without his acquiescence.” *Id.* at 14054 (emphasis supplied).

³¹ See H.R. Rep. No. 102-317, at 16 (1991).

The *Joffe* court also considered a constitutional challenge to the TCPA's ATDS provision in the context of text messaging, but considered it a content-neutral time, place and manner restriction on speech.³² According to the relevant test, a government regulation will be found constitutional if it: (1) serves a significant government interest; (2) is narrowly tailored to serve that interest; and (3) leave open ample alternative channels for the communication of the information.³³ The court again identified the significant government interest as protecting consumers from unwanted and unrequested commercial intrusion and telemarketing calls particularly given how wireless telephones have permeated American life.³⁴ Further, the court found that the TCPA was sufficiently narrowly tailored as it applied only to calls (or text messages) that are placed automatically.³⁵ Finally, the court determined that there were ample alternative means as the ATDS provision only restricts sending text messages automatically.³⁶

The test applied in *Joffe* fails for the same reason the *Central Hudson* test does when applied to GroupMe. Assuming the TCPA ATDS provision is a content neutral regulation that serves a substantial government interest, it has not been narrowly tailored to achieve the goal of prohibiting commercial text messages. It prohibits not only commercial speech, but non-commercial speech entitled to full First Amendment protection. Thus, it is overly broad.

The content-neutral time, place and manner test also fails as there are not ample alternative channels for the communication of the information. Commercial and non-commercial

³² See *Joffe*, 121 P.3d at 841.

³³ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293(1984)).

³⁴ See *Joffe*, 121 P.3d at 842-43.

³⁵ See *id.*

³⁶ See *id.*

speech is prohibited by the statute. All programmable equipment, without regard to whether autodialing capabilities are actually used or even deployed, is forbidden. What makes GroupMe's service attractive to its users is that anyone with a computer or a mobile device can participate across all mobile platforms. The availability of email is not a substitute as it is neither as ubiquitous nor as immediate as text messaging. Accordingly, the TCPA's ATDS provision does not survive First Amendment scrutiny as applied to GroupMe.

IV. CONCLUSION

For the reasons set forth herein, GroupMe respectfully requests expedited consideration of the Petition, clarification of the term "capacity" to encompass only equipment that, at the time of use, could, in fact, have autodialed random or sequential numbers without human intervention and without first being technologically altered, and clarification that wireless subscribers may consent to receive non-commercial, administrative, or informational calls or text messages through an intermediary.

Respectfully submitted,

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Dated: August 30, 2012